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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1841

WESTLAKE HOSPITAL ASSOCIATION, AN ILLINOIS CORPORATION NOT FOR PROFIT, ALFRED F. AKKERON, WALTER H. YOUNG, EDMUND G. BRUST, JR., EDMUND G. BRUST, SR., EDGAR M. ELBERT AND GUY C. GUERINE,

Appellants,

vs.

EINAR BLIX, WEBSTER D. CORLETT, LAWRENCE MORENO, SAM RUBIN, R. W. SVENDSEN, A. EVERETT JOSLYN, JR., WILLIAM P. O'BRIEN AND GERHART M. COLLATZ,

Appellees.

On Appeal From the Supreme Court of the State of Illinois

JURISDICTIONAL STATEMENT

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WESTLAKE HOSPITAL ASSOCIATION, AN ILLINOIS CORPORATION NOT FOR PROFIT, ALFRED F. AKKERON, WALTER H. YOUNG, EDMUND G. BRUST, JR., EDMUND G. BRUST, SR., EDGAR M. ELBERT AND GUY C. GUERINE,

Appellants,

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Appellees.

On Appeal From the Supreme Court of the State of Illinois

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Illinois, made final upon denial of appellants' petition for rehearing on March 19, 1958, which said judgment reverses the decree of the Superior Court of Cook County, Illinois. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the Supreme Court of Illinois is reported in 13 Ill. 2d 183 and in 148 N.E. 2d 471. The decree of the Superior Court of Cook County is unreported. Copies of the opinion of the Supreme Court of Illinois as modified upon the denial of rehearing and of the decree of the trial court are attached as exhibits hereto.

Jurisdiction

The plaintiffs-appellants, representing the founders and donors of Westlake Hospital Association, an Illinois corporation not for profit, brought this suit to declare and confirm that the defendants, purporting to be a majority of the board of directors of the hospital, could not amend the by-laws of the corporation so as to oust plaintiffs from exercising ultimate government over the eleemosynary corporation which they had created. The Supreme Court of Illinois, in its opinion herein, interpreted and construed Chap. 32, pars. 163a-163a100, Ill. Rev. Stat., 1955, to permit the defendants to amend the by-laws to change the fundamental government of the corporation, holding that said statute changed the provisions of Ill. Rev. Stat., 1937, Chap. 32, pars. 158-163 under which Westlake Hospital Association was incorporated and holding that such change as applied to the facts at bar did not invade the appellants' rights under the Constitution of the United States of America. Appellants are of the opinion that Chap. 32, pars. 163a-163a100 as interpreted and construed by the Supreme Court of Illinois and as applied to the facts at bar do constitute an invasion of rights guaranteed to appellants under the Fourteenth Amendment and under Article I, Section 10 of the Constitution, and invoke the jurisdiction of the Supreme Court of the United States under 28 U.S.C. 1257(2). The following decisions sustain the

jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Illinois herein on direct appeal: *Phillips Petroleum Co.* v. *Jenkins,* 297 U.S. 629, 56 S.Ct. 611 (1936); *Yazoo and Mississippi Valley Railway Co.* v. *Adams,* 180 U.S. 1, 21 S.Ct. 240 (1900); *Chicago, Burlington & Quincy Railroad Co.* v. *Nebraska,* 170 U.S. 57, 18 S.Ct. 513 (1898).

Questions Presented

1. Is the right of the founders of a charitable corporation to govern that corporation in accordance with the contractual terms of their grant constitutionally protected by the Fourteenth Amendment as a property or otherwise legally enforceable right, which such right may not be invaded by the state legislature?

2. Is such a right protected by Article I, Section 10 of the Constitution, prohibiting a state from impairing the contract entered into when the founders of the hospital received its certificate of incorporation from the State of Illinois and enacted the by-laws of the corporation?

3. May the "reserved power" in the former business corporation act relied upon by the Supreme Court of Illinois to sustain this deprivation of plaintiffs' right be exercised only for the reasonable promotion of the health, safety, welfare or morals, or may it be exercised (as the Supreme Court held it was exercised by the enactment of the Illinois General Not-for-profit Act) to deprive appellants of their property without due process of law as an arbitrary action of the state legislature?

4. Can the Supreme Court of Illinois itself enforce the deprivation of appellants' rights in contravention of the Fourteenth Amendment and of Article I, Section 10 of the Constitution of the United States?

Statutes Involved

28 U.S.C. 1257(2); "An Act Concerning Corporations, approved April 18, 1872," as amended, Ill. Rev. Stat., 1937, Chap. 32, pars. 158-163; the Illinois "General Not for Profit Corporation Act," Chap. 32, pars. 163a-163a100, Ill. Rev. Stat., 1955; Ill. Rev. Stat. 1919, Chap. 32, par. 28a118, the Illinois "Business Corporation Act," Laws of 1919, page 347, sec. 146; secs. 157.167, Chap. 32, Ill. Rev. Stat. 1935. Illinois Civil Practice Act, Ill. Rev. Stat., 1955, Chap. 110, sec. 75. Pertinent excerpts are attached in Appendix III.

Statement of Facts

The constitutional issues were first raised by appellants in their complaint; were submitted to the trial court in the Agreed Statement of Facts (Rec. 3, Abst. 1) which constituted all the evidence herein as well as disclosure of the pleadings; were passed upon by the trial court in appellants' favor (Rec. 3, Abst. 57-58), and by the Supreme Court of Illinois (which had jurisdiction on direct appeal from the trial court under Illinois law, Chap. 110, Sec. 75, Ill. Rev. Stat. 1955 only because a constitutional issue is involved) in its opinion rendered herein (Rec. 6, *et seq.*). Pertinent quotations are set forth below.

The plaintiffs-appellants and their predecessors donated their ownership of Proviso Hospital Association, a business corporation, to Westlake Hospital Association. Westlake Hospital Association, an Illinois corporation not for profit, had been organized under a former not for profit act (An Act Concerning Corporations, approved April 18, 1872, as amended, Ill. Rev. Stat., 1937, Chap. 32, pars. 158-163), and was governed ultimately by the membership of the corporation, who are its founders and their successors (plaintiffs-appellants here). Under the former statute, the certificate of incorporation, and the original by-laws of the

corporation, the membership elected directors, retained (under the interpretation of the Supreme Court of Illinois, Rec. 12, *et seq.*), the right to act on changes of the by-laws proposed by the directors, to cumulate their votes in the election of directors, and had other rights and privileges. The Illinois General Assembly, subsequent to the organization of the appellant corporation, enacted a new General Not for Profit Corporation Act (Ill. Rev. Stat., 1955, Chap. 32, pars. 163a-163a100 being in force at the time the trial court considered this case and in all material respects still in effect). The Supreme Court of Illinois, in its decision herein (Rec. 13, *et seq.*) has interpreted this latter statute to permit the defendants, purporting to act as a majority of the board of directors of the corporation (the directors being elected by the membership under the by-laws) to amend the by-laws to make the board cooptating or self-perpetuating and amend the by-laws to give power of the amendment thereof to the directors. That is, the Supreme Court of the State of Illinois has held that the Illinois General Not for Profit Act (Ill. Rev. Stat., 1955, Chap. 32, pars. 163a-163a100) gave the right to the defendant directors, agents of the plaintiffs-appellants (who represent a majority of the memberships) to remove ultimate control of the hospital from appellants and assume such control upon themselves.

The Questions Are Substantial

The statute of the state of Illinois here challenged, as that statute was interpreted below by the Supreme Court of Illinois*, permits the General Assembly to divest those

* To appellants, the construction placed upon the statute in question by the Supreme Court of Illinois is unsound, but that construction is conclusive and binding upon this Court. *Albertson* v. *Millard*, 345 U.S. 242, 73 S.Ct. 600 (1953); *Bunch* v. *Cole*, 263 U.S. 250, 44 S.Ct. 101 (1923).

exercising control over a charitable corporation of such control, and to vest the same in others, and permits the General Assembly to allow the Board of Directors of such a corporation to divest the membership of such control. The Supreme Court of Illinois relies on an alleged but non-existent "reserve power" in the statute under which Westlake Hospital was incorporated to justify its result.

If the General Assembly of the State of Illinois can arbitrarily take away the government of Westlake from its founders and vest control in others, then, under the principles of constitutional law enunciated by the court below, any state can divest any trustees of a corporate charitable trust from their positions and vest control in others, all under the guise of an exercise of the reserved power.

We submit that implied in the decision of the Illinois Supreme Court is a radical change in the structure of American society and a basic departure from the concepts of property, as well as the notions of justice and fair play, inherent in our constitutional scheme. We submit that the statute of Illinois, as interpreted by the Supreme Court of that state, has far-reaching consequences meriting the plenary attention of this court.

1. Charitable Corporations Constitute an Important Area of National Life, and Play an Important Role in American Society

The decision below affects the organization, control, and management of the eleemosynary corporation; in this instance, a community hospital. Such corporations comprise a large variety of other charitable and not-for-profit or-

ganizations as well, including schools, churches, charities, and many other kinds of institutions.[1]

To suggest that the structure of eleemosynary corporations is a matter to be treated lightly and undeserving of the attention of this court would be to ignore the attention given to this subject by scholars, publications, and the Congress of the United States.[2] Unfriendly critics of private institutions and their function in society may find the Illinois statute as interpreted by the Illinois Supreme Court a powerful weapon to attain their ends.

In support of appellants' contention that charitable donation cannot be considered a small, private matter, it should be borne in mind that sums in excess of six billions of dollars are annually donated for philanthropic purposes (Andrews, F. Emerson, *Philanthropic Foundations*, Russell Sage Foundation, New York, 1956). Noteworthy is the fact that more than seventy-two per cent of these funds are derived from private individuals (*ibid.*, 19). The number of American philanthropic foundations reported in published directories has increased from twenty-seven in 1915 to 4,162 in 1955 (*ibid.*, 14). *Cf. Cumulative List of Orangizations Described in Section 170(c) of the Internal Revenue Code of 1954,* U.S. Government Printing Publication 78 Rev. 6-57 (1958). The estimated assets of the charitable foundations alone, which comprise but one segment of the

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[1] Andrews, F. Emerson, *Philanthropic Foundations*, Russell Sage Foundation, New York, 1956. Kiger, Joseph C., *Operating Principles of the Larger Foundations*, Russell Sage Foundation, New York, 1954. Harrison, Shelby M. and Andrews, F. Emerson, *American Foundations for Social Welfare*, Russell Sage Foundation, New York, 1946.

[2] In addition to such works as are cited in Note 1, *supra*, see Hearings Before the Select (Cox) Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, U.S. House of Representatives, 82nd Congress, 2d Session, Government Printing Office, 1953, Page 13.

American philanthropic scene, amounted to over four billions of dollars in 1953, and reported expenditures in that year were in excess of 370 millions of dollars (Andrews, F. Emerson, *supra,* p. 17).

Contributions to organizations concerned with health, hospitalization, and medical research are second only to those in support of educational institutions (Andrews, F. Emerson, *supra,* p. 284). It has been estimated that there were between 30,000 and 35,000 foundations in this country in 1953, including endowments to hospitals, scientific societies, and other charitable bodies (Andrews, page 13 and Hearings Before the Select (Cox) Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, U.S. House of Representatives, 82nd Congress, 2d Session, Government Printing Office, 1953, page 13).

Further statistical material would serve merely to burden the Court. Suffice it to say that philanthropy in America has grown into a gigantic enterprise and occupies a crucial position in our society.

Included in this vast array of charitable organizations are enterprises such as the Ford Foundation and the Rockefeller Foundation, with their tremendous resources and countless worthy actvities. Also included are the relatively smaller, but no less important and no less worthy bodies, such as Westlake Hospital. Westlake, and the many institutions like it, have been established and supported to fulfil the needs of communities which would not otherwise be adequately served.

The unique position of these associations, brought about by their non-profit nature and tax-exempt status, placed a heavy responsibility upon those charged with the administration of their assets, and certainly public controls in a valid exercise of the police power to prevent subversion

of the charitable purposes of the donors would not be objectionable. But that the State should have the power to destroy or disregard the donative intent of those whose funds support such activities and destroy the terms and conditions of the grant should be deemed in violation of the contractual and property rights protected by the Constitution of the United States. Any legislative enactment which has the effect of divesting the donors of their voice in the management and affairs of these organizations or the application of these vast resources, deprives them of their constitutional guarantees.

The statistics cited above serve to illustrate that there is no justification for the proposition that non-profit corporations occupy a less important role in our society, or that their contributors are entitled to any less protection than the shareholders of a business corporation. The police powers which may be applied to a small corporate shoe store may be somewhat different in nature from those applicable to the Ford Foundation, but that the right to control the shoe store should be constitutionally protected and the right to the Ford Foundation not protected would seem an absurd and unjust result. The terms and conditions of the donative intent of Westlake's founders should similarly be accorded the protection of the Constitution. It is more than incongruous to suppose that a man who dedicates his property to selfish business ends is entitled to constitutional protection while the man who dedicates his property to a social use is not.

2. Application of the Contract Clause

The doctrine is well established that a corporate charter is a contract within the meaning of Article I, Section 10, Clause 1 of the United States Constitution, which prohibits a state from enacting any statute which would impair the

obligation of contract. *Chicago, Burlington & Quincy Railroad Co.* v. *Iowa,* 94 U.S. 155 (1876); *Long Island Water Supply Company* v. *Brooklyn,* 166 U.S. 685, 17 S.Ct. 718 (1897); *Kreiker* v. *The Naylor Pipe Company,* 312 U.S. 659, 61 S.Ct. 735 (1940). As is held in Justice Marshall's landmark opinion in the *Dartmouth College* Case (*The Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518 (1819) at page 650): "The opinion of this court, after mature deliberation, is that this [charter] is a contract, the obligation of which cannot be impaired without violating the Constitution of the United States."

It is equally well settled law that the Supreme Court possesses the paramount authority to review the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, and to determine for itself the existence or non-existence of the contract, and whether its obligation has been impaired by the state enactment. *Chicago, Burlington & Quincy Railroad Company* v. *Nebraska ex. rel. Omaha,* 170 U.S. 57, 18 S.Ct. 513 (1898); *Yazoo and Mississippi Valley Railway Co.* v. *Adams,* 180 U.S. 1, 21 S.Ct. 240 (1900).

The Reserve Power

The actions of state legislatures altering corporate charters in general, and the action of the legislature in the case at bar in particular (as is more specifically discussed below), are defended on the basis of the so-called "reserved power." The reserved power, a general reservation in general or special acts upon which corporations receive their charters, does undeniably permit a state under certain circumstances to alter corporate charters. It is, however, axiomatic that this power is not limitless and that it may be utilized only insofar as the valid exercise of the police power may be made. It cannot be exerted arbitrarily to

make alterations which are inconsistent with the objects of the charter, or to change the mode of controlling the affairs of the stockholders amongst themselves, or to destroy or impair any vested property rights. Among the leading cases in this court so holding are *Phillips Petroleum Co.* v. *Jenkins,* 297 U.S. 629, 56 S.Ct. 611 (1936); *Coombes* v. *Getz,* 285 U.S. 434, 52 S.Ct. 435 (1931).

Although the Supreme Court of Illinois in its opinion discusses various constructions of the various documents and other related issues, it ultimately decides that the statute could constitutionally operate effectively to deprive the founders of Westlake of their creation because of the "Reserved Power." *Westlake Hospital Assn.* v. *Blix,* 13 Ill. 2d 183, 195-196, states as follows:

> Plaintiffs urge that the articles of incorporation and the by-laws enacted thereunder constitute a contract between the State and the corporation, the corporation and its members, and the members *inter sese* (*Kreicker* v. *Naylor Pipe Co.,* 374 Ill. 364) and that this contract may not be impaired. [Citing constitutions of Illinois and United States.] Although we agree with these general principles, *we must add that the contract is ever subject to the State's reserved power of amendment, when in the opinion of the legislature the interests of the charitable corporation will be promoted thereby, and to the right of such corporation to amend its by-laws, pursuant to by-law provisions.* [Citing cases and citing section 146 of the 1919 Business Corporation Act, Laws of 1919 (Illinois), page 347 and the 1944 Ill. General Not for Profit Act, Chap. 32, par. 163a99, and 163a32, containing "reserved power" clauses.] Therefore, the members entered into this contract with the reserved power to amend the statute and by-laws outstanding in the State and in the corporation. This right or power was validly exercised by the board of directors of Westlake. [Textual emphasis added.]

It is apparent that the Illinois Supreme Court is of the belief that the power of the legislature over corporations is plenary and that it may be exercised without regard to the rights, obligations and duties of the members of the corporation, whenever, in the opinion of the legislature some change is desirable. The radical nature of the State's power as viewed by the Illinois Supreme Court is evidenced by the facts in the case at bar wherein, as the Court below holds, the legislature, by virtue of the reserved power, could empower the directors of the corporation involved to seize control of the corporation from the members whom the directors were elected to serve. Appellants submit that the reserved power does not give the legislature the untrammelled power to make arbitrary changes in the internal structure of a charitable corporation, which such changes have no relationship whatever to the health, safety, morals, or welfare of the people or to prevent fraud or injustice.

Nor has this Court ever sanctioned so abrupt and radical a departure from the established traditions of our constitutional system. In addition to such general authorities as *Phillips Petroleum Co.* v. *Jenkins*, 297 U.S. 629, 56 S.Ct. 611 (1936); *Coombes* v. *Getz*, 285 U.S. 434, 52 S.Ct. 435 (1931), see *Rogers* v. *Hill*, 289 U.S. 582, 53 S.Ct. 731 (1932) wherein this Court, speaking of an analogous situation, held, "It would be preposterous to leave the real owners of the corporate property [there the stockholders and here the members] at the mercy of their agents [in both instances, the directors], and the law has not done so." Yet the Illinois Supreme Court would constitutionally permit the agents of the members to take away government of this hospital from their principals.

In the Matter of the Election of Directors of the Newark Library, 64 New Jersey Law 217 (1899) (reversed on other

grounds, 64 N.J.L. 265 (1900)), holds that, "The power reserved by the legislature in the act of 1846 to alter, suspend, and repeal relates to those matters which concern the public, and not to the mode of controlling the affairs of the stockholders *inter sese*. The legislature may alter or repeal the charter and extinguish the corporate existence of the association [in that case a library board], but it is without power to take away from the shareholders the property which they have acquired during its existence, and the act of 1846 does not reserve the power to affect or change the rights of the corporations as between each other. The method of voting prescribed in the charter is part of the contract between the stockholders. It relates to the manner of controlling the association and its property represented in their shares as between themselves. It in nowise affects the public, and is a contract which cannot be impaired by legislation." The principal difference between the *Newark* case and the case at bar is that the terminology of stock and stockholder there is replaced by membership and member here. (*Cf. Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 73 S.Ct. 143 (1952), holding unconstitutional an attempted change in the directing body of a church organization under the Fourteenth Amendment; that case, of course, has a First Amendment incorporation as to religion not present in the case at bar.)

That the Impairment of Contract Clause protects not-for-profit corporations has, of course, been evident from the very inception of the judicial history of the doctrine: The *Dartmouth College* case itself (4 Wheat. 518, 1819) did, after all, involve a not-for-profit institution.

No Reserved Power Applicable

The issue of the "reserved power" was injected into this case for the first time in the opinion of the Supreme Court of Illinois (Rec. 14-15); it had not previously been raised by the parties. To this point in the discussion, the assumption of the Supreme Court of Illinois that a reserved power is applicable has been made for the sake of the argument. However, it is apparent that the *Dartmouth College* case, 4 Wheat. 518 (1819), is strictly controlling here and that no reserved power is involved at all.

The Supreme Court of Illinois relies, in its discussion of the reserved power, upon two statutes: Section 146 of the 1919 business corporation act (Laws of 1919, page 347) and Section 100 of the General Not for Profit Act of 1944 (Ill. Rev. Stat., 1955, Chap. 32, par. 163a99) (Rec. 14, 15). Neither of these statutes, which contain reservations of power, is applicable to the situation at bar.

Section 146 of the 1919 Act is not applicable for two reasons: First, it had been repealed in 1933 by the business corporation act enacted in that year and was not in existence in 1939 at the time that Westlake was organized, Ill. Rev. Stat., 1939, Chap. 32, Section 157.167. Secondly, it is a business corporation act and was never applicable to corporations not-for-profit such as Westlake, and it is entitled "An Act in relation to corporations for pecuniary profit," Ill. Rev. Stat., 1919, Chap. 32. The citation of the Supreme Court of Illinois to this statute is therefore immaterial.

The Illinois court also relies on Section 100 of the 1944 General Not For Profit Act (Ill. Rev. Stat., 1955, Chap. 32, par. 163a99). However, the General Assembly enacted this legislation *after* Westlake was incorporated in 1939, and it is difficult to perceive the materiality of a *subsequent* enactment reserving powers to the State.

Whether the Supreme Court of Illinois thought that the legislation which it cites constitutes a constitutional reservation of power or not, this Court has held that *it* shall decide whether the terms of a contract have been impaired. *Coombes* v. *Getz,* 285 U.S. 434, 52 S.Ct. 435 (1931); *Chicago, Burlington & Quincy Railroad Co.* v. *Nebraska,* 170 U.S. 57 (1898). Appellants submit that it is patent that, while the Supreme Court of Illinois may construe the statutes of Illinois to bind this Court as to their meaning, that that Court cannot make retroactive constructions or applications which serve to deprive appellants of contractual rights protected by the United States Constitution.

3. Due Process of Law

In addition to the violation of the Impairment of Contract clause, the decision of the Supreme Court of Illinois in the case at bar holds that the state legislature may deprive the plaintiffs-appellants of their property (or rights in the nature of property) without due process of law, and itself effectuates a deprivation of property without due process contrary to the doctrine of *Shelley* v. *Kraemer,* 334 U.S. 1, 68 S.Ct. 836 (1948).

The appellants, the membership of Westlake Hospital Association and founders and successors to the founders of the hospital, donated their interest in the former business corporation, Proviso Hospital Association (Rec. 3, Abst. 3-7) and received memberships and bonds therefor (Rec. 3, Abst. 3-7). The appellees, with minor exceptions, have no such interest in the corporation (Rec. 3, Abst. 63-4). The decision of the Illinois Supreme Court in effect deprives the plaintiffs of control of the asset, which although dedicated to public purposes, is or constitutionally should be still theirs for the purposes of administration. *Phillips Petroleum Co.* v. *Jenkins,* 297 U.S. 629, 56 S.Ct. 611 (1936).

It is respectfully submitted that the decision of the Supreme Court of Illinois fails to recognize the constitutional rights of the plaintiffs, both under Article I, Section 10, Clause 1 and the Fourteenth Amendment; that that decision is a radical departure from the economic and social structure (as well as the constitutional structure) of our society which threatens the economic, social and constitutional order; and violates the precepts of reason and justice. Plaintiffs submit that the questions presented by this appeal are substantial and of vital public importance, and the plenary attention of the Court is requested.

Respectfully submitted,

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APPENDIX I

(No. 34473.—Judgment reversed.)

WESTLAKE HOSPITAL ASSOCIATION *et al.*, Appellees, *vs.* EINAR BLIX *et al.*, Appellants.

Opinion filed January 24, 1958—Rehearing denied March 19, 1958.

Mr. CHIEF JUSTICE DAVIS delivered the opinion of the court:

This is a declaratory judgment action arising out of the adverse claims of plaintiffs and defendants as to which group of directors and which set of by-laws constitute the legal board of directors and bylaws of the Westlake Hospital Association, a not-for-profit corporation.

The cause was submitted on an agreed statement of facts and the trial court entered a judgment finding that the plaintiffs constituted a majority of the legal board of directors of Westlake, and that the bylaws, as last amended by the members, were the legal bylaws.

The facts are not in dispute. Westlake Hospital Association owns and operates Westlake Hospital, located at Melrose Park, Illinois. It is a not-for-profit corporation which succeeded to the assets of Proviso Hospital Association, an Illinois Corporation. For some years prior to 1939, Proviso, which owned and operated the hospital, had been unable to earn sufficient income to meet its fixed interest charges and taxes. Real-estate taxes had not been paid since 1928 and, of course, no dividends were being paid to stockholders. The board of directors proposed that the hospital be reorganized as a not-for-profit institution for charitable and educational purposes, and emphasized that as a charitable institution the hospital would be exempt from local, State and Federal taxes and regulations and would be able to receive gifts, endowments and legacies.

It proposed to issue $50 par value class A 5 per cent income debentures for each share of preferred stock of Proviso Hospital Association. The holders of the $50 par value common stock were to receive one $50 par value class B 5 per cent income debenture for each share of common stock they held. In addition, each common stockholder was to receive one membership in the new not-for-profit corporation in exchange for each share of common stock held by him. The initial fee for a regular membership was $50 which was deemed and considered to be its value, and could be paid for in class A or B income debentures, in lieu of cash.

The reorganization was carried out as contemplated and Westlake Hospital Association (Westlake) was organized on January 5, 1939, under sections 29-34 of "An Act Concerning Corporations" approved April 18, 1872, as amended. (Ill. Rev. Stat. 1937, chap. 32, pars. 158-163.) Its purpose clause read as follows:

> "The corporation is organized for the purpose and with the object of operating and maintaining a hospital for the treatment of all patients alike regardless of creed, race or ability to pay, charging a graduated fee according to ability to pay, but in no case to make any profit; to be maintained by voluntary contributions of charitable inclined persons; to educate young women in the vocation of nursing without cost to them for tuition; to promote medical research for scientific purposes and not for profit."

The original by-laws of Westlake were adopted on March 11, 1939, and provided for three classes of members—regular, life and honorary. The regular members were the old common stockholders of Proviso and such of the debenture holders as should exchange their debentures for memberships. Life members were those who donated

an unspecified amount to the hospital fund, and honorary members were those upon whom the board of directors conferred such membership in recognition of service. The right of suspension or expulsion of members rested with the board of directors, which consisted of nine members who were to manage and control the property, funds and affairs of the corporation. They were to be elected for a term of three years by the members. Vacancies were to be filled by the president, or, upon his failure to appoint, then by a majority of the remaining directors. A majority of the elected and acting directors constituted a quorum. There was a house committee and a membership committee. Meetings of the members were to be held annually. Members were given the right to vote in person or by proxy and to cumulate their votes for the election of directors.

The bylaw provision respecting amendments, which is vital to the issues here presented, was at all times as follows:

"ARTICLE 10
AMENDMENTS

"Section 1. Any By-Laws may be repealed, modified, altered or amended or new By-Laws adopted at any regular or special meeting of the Board of Directors by a majority vote of the members of the Board, provided that no such change shall take effect until thirty days after the mailing of notice thereof, with copy of the By-Laws as so proposed by the Board, to all members of the corporation."

At a meeting of the members on June 18, 1949, when Westlake had 1260 regular memberships, 42 life memberships, and no honorary memberships, 779 of which were represented personally and 274 by proxy, Messrs. Akkeron, Brust, Collatz, Dixon, Elbert, Guerine, Joslyn, Kionka, and Young were unanimously elected to the board of directors, and the board of directors was authorized, at its discre-

tion, to increase the membership from 9 to 11. No other members' meeting, at which directors were elected, was held until January 22, 1953. During the period from June 18, 1949, until January 22, 1953, the board of directors conducted the affiairs of the hospital. At a series of directors' meetings during this period, the board of directors was, by resolutions of the directors, expanded until the membership reached 15. The vacancies thus created were filled by the board of directors. This expansion in the number of directors was neither reflected in bylaw amendments, nor was formal notice of the action of the directors sent to the members.

At a duly convened meeting of the board of directors on December 11, 1952, at which time the board purported to consist of 15 members, there were 11 directors present. Of those present, five were members of the original nine-member board of directors which had been elected at the 1949 members' meeting which authorized the board of directors to increase its membership from 9 to 11 members. At this directors' meeting the bylaws were amended by unanimous vote, whereby the number of directors was increased to 15, to serve for terms of not to exceed three years; life members were designated as those who donated $500 or more to the hospital fund; life and honorary memberships were stated to be without interest in the assets and property of the corporation and without voting rights; regular memberships were permitted to pass to the personal representatives, heirs or legatees of the deceased member without limitation; the duties of the house committee were restated in terms more appropriate to a hospital; and a majority of the members was stated to constitute a quorum. Copies of the amended bylaws were mailed to all of the members of Westlake.

At the regular annual members' meeting held on January 22, 1953, subsequent to the mailing of the notice of the amended bylaws, a motion was unanimously adopted approving the acts and doings of the officers and board of directors of Westlake during 1952. The record does not show whether the minutes of the meeting at which the bylaws were amended were read to the members. At this meeting, the members, acting pursuant to the amended bylaws, unanimously elected 15 directors, five for a term of one year, five for two years, and five for three years. At each of the annual members' meetings held during the succeeding years, five directors were elected to fill the terms of the directors whose terms of office were expiring.

On December 15, 1955, there were 1,260 regular memberships outstanding registered in the name of 49 individuals, nine of whom were deceased. There were 42 life memberships held by 42 separate business organizations, individuals or other associations. Prior thereto, various persons, firms and corporations had contributed or pledged approximately $250,000 to be used to expand the hospital facilities.

At a regular meeting of the board of directors on August 16, 1955, certain amendments to the by-laws were adopted by a vote of eight of the directors, defendants in this proceeding, over the negative votes of five directors, plaintiffs herein. These amendments added donation members to the various classes of membership of the corporation. Donation members were defined to be those persons who had or thereafter would donate $50 or more to the hospital and who did not desire to become regular members. They were not to be deemed to have ownership in any of the assets of the corporation. The right to vote was given to life members for every $50 donated, and to each honor-

ary and donation member. Notice of the amendments was promptly sent to all of the members.

Upon receipt of the notice, five individuals called a special meeting of the members which was held on September 6, 1955. The members calling the meeting constituted less than 20 per cent of the regular members, although they held more than 20 per cent of the regular memberships in Westlake. At that meeting, the members purported to amend the bylaws to eliminate donation members, and their right to vote, to grant to the members the residual powers formerly granted to the board of directors, and to take the power of suspension and expulsion from the board and give it to the members. In addition, they provided for a nine-man board of directors to serve for a term of one year with vacancies to be filled by action of the president and remaining board of directors subject to the approval of the members. They gave the right of bylaw amendment to the members, and finally, provided that all actions of the board were to be subject to approval by a majority of the members.

The board of directors met subsequently on November 22, 1955, at which time they purported to amend the bylaws previously adopted by them to provide that as the term of office of each group of five directors expired, their successors were to be elected by the board of directors at their annual meeting. The effect of this amendment was to make the board of directors self-perpetuating and to transfer the right of election from the members to the board of directors. Notice of the amendment was duly sent to all of the members.

Shortly thereafter the members again met and purported to nullify the amendments passed at the previous meeting of the board of directors and to re-establish the right of the members to elect directors and to control the affairs

of the hospital. In January, 1956, two boards of directors of Westlake were elected, one by the board of directors at its annual meeting, and one by the members at their regular annual meeting. There were also two sets of bylaws then in existence, one adopted by the members and one by the board of directors.

The existence of the two boards of directors and the two sets of bylaws was the catalyst which precipitated this litigation. The plaintiffs, directors elected by the members, brought action for a declaratory judgment seeking an adjudication that the board of directors elected by the members and the bylaws adopted by them constitute the legal board of directors and bylaws of Westlake. The defendants counterclaimed for an adjudication that the board of directors elected by the board of directors and the bylaws as amended by them were the valid and subsisting board of directors and bylaws of Westlake.

The case was submitted on an agreed statement of facts to the superior court of Cook County, sitting in chancery, which found the issues in favor of the plaintiffs. By its judgment the trial court held that the board of directors did not have the power to amend the bylaws, and that if the board had such power, its exercise to deprive the members of their right to elect the directors, to vote cumulatively and to amend the bylaws would violate the fourteenth amendment to the constitution of the United States and section 2 of article II of the constitution of the State of Illinois. Constitutional questions having been decided by the trial court, the defendants appeal directly to this court.

We are met at the outset with the question of the legality of the directors' meeting of December 11, 1952, which amended the bylaws to provide for 15 directors. It is con-

ceded by the parties that the members validly elected a nine-man board on June 18, 1949; that there were no further meetings or elections of directors by the members until January 22, 1953; that in the interim, and prior to December 11, 1952, the board of directors illegally attempted to increase its membership from nine to 15 in a manner not authorized by either the governing statutes, its charter or bylaws. However, we conclude that the nine-man board elected in 1949 held over until their successors were elected and qualified. (*Western Cottage Piano & Organ Co.* v. *Burrows,* 144 Ill. App. 350; *Potwin* v. *Grunewald,* 123 Ill. App. 34.) This board, or a majority thereof, necessarily retained the power to act on behalf of the corporation. (*Western Cottage Piano & Organ Co.* v. *Burrows.*) A quorum of this board, having this residuum of power, met in a regular meeting for which proper notice had been given and purported to amend the bylaws. This they clearly would have had the power to do unless their action was invalidated by the presence of additional directors improperly selected. However, notice of the amendment was sent to the members, pursuant to article 10 of the bylaws, and at a meeting of the members on January 22, 1953, a motion was unanimously adopted approving the acts and doings of the officers and directors of Westlake during 1952, and 15 directors were then elected by the members. Thereafter and until September 6, 1955, the members continued to elect 15 directors and acquiesce in this amendment. On the basis of these facts, we conclude that the action of the five hold-over directors on December 11, 1952, as unanimously approved by the members, effectively amended the bylaws of the corporation. (*Supreme Lodge Knights of Pythias* v. *Kutscher,* 179 Ill. 340, 345.) This determination is strengthened by the continued acquiescence of the members in the provisions of the amendment.

After the directors meeting of December 11, 1952, which was duly ratified by the members on January 22, 1953, it became proper for the members to elect a 15-man board of directors. We find neither a constitutional right in the members to vote for directors, nor a constitutional prohibition of the staggered election of directors, in that not-for-profit corporations are not governed by the constitutional mandate of section 3 of article XI of the Illinois constitution of 1870. *American Aberdeen-Angus Breeders' Ass'n* v. *Fullerton*, 325 Ill. 323; Cf. *Wolfson* v. *Avery*, 6 Ill. 2d 78.

Section 15 of the 1944 act concerning General Not for Profit Corporations, provides: "The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or the by-laws. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members. * * * The articles of incorporation or the by-laws may provide that in all elections for directors every member entitled to vote shall have the right to cumulate his vote and to give one candidate a number of votes equal to his vote multiplied by the number of directors to be elected, or to distribute such votes on the same principle among as many candidates as he shall think fit." (Ill. Rev. Stat. 1955, chap. 32, par. 163a14.) In the absence of any constitutional proscription, these provisions are adequate to authorize both cumulative voting by the members and the staggered election of directors. The statutory provision authorizing a limitation upon the right of the members to vote permits the staggered election of directors, and article 3 of the bylaws of December 11, 1952, contemplated such election.

Plaintiffs further argue that two members of the 15-man board were not qualified to hold office at the time the by-

laws were again amended in 1955. However, the ineligibility of these two members could not affect the vote of the eligible directors on the 1955 amendments.

With the disposal of this threshold question, we face the dispositive issue of whether the members, or the directors, have the primary power to amend the bylaws of a not-for-profit corporation. We turn first to the act of 1872 under which Westlake was incorporated as an aid in interpreting the applicable law. Section 31 of that act provided that not-for-profit corporations "may, by their trustees, directors or managers, make by-laws not inconsistent with the constitution and laws of this State, or the United States, * * *. The by-laws of the corporation made by the trustees, directors or managers, may be modified, altered or amended at any such regular meeting, [of members] or at any adjourned session thereof, or at any special meeting called for that purpose." Ill. Rev. Stat. 1937, chap. 32, par. 160.

The statute clearly delegated to the directors the exclusive power to make bylaws, but subjected such bylaws to modification or amendment by the members. The original delegation, standing alone, would certainly vest the directors with the *exclusive* power both to make and amend the bylaws, and consent or ratification of the members would not have been required. There is ample authority that the original delegation to the directors of power to make bylaws, carries with it power to amend without the consent or ratification of the members. (8 Fletcher, Corporations, sec. 4178, p. 684; *Manufacturers' Exhibition Bldg. Co.* v. *Landay,* 219 Ill. 168, 177.) However, we need not decide this point since we regard the delegation of power to the members to modify or amend bylaws in compliance with the statute, as an additional grant of power. There is no indication in the language of the statute that

the power given to them was intended to be exclusive. If, after amendment of the bylaws by the directors with proper notice thereof to the members, no action was taken by the members at the regular annual meeting, an adjourned session thereof, or a special meeting called for such purpose, altering or modifying the amendment made by the directors, then such amendment would certainly become a valid and existing part of Westlake's bylaws.

Article 10 of the original bylaws of the corporation provided that the bylaws may be amended "at any regular or special meeting of the board of directors by a majority vote of the members of the board, provided that no such change shall take effect until thirty days after the mailing of notice thereof, with copy of the by-laws as so proposed by the board to all members of the corporation."

Plaintiffs earnestly argue that this bylaw, when construed in the light of the Corporation Act of 1872, means that the directors may propose, but only the members may adopt amendments to the bylaws. They point out that otherwise there would be no purpose in mailing a notice of new bylaws to the members. We cannot agree with this contention. Notice under article 10 of the bylaws would inform the members of Westlake of the provisions of the amendment, and such members could then, pursuant to the provision of section 31 of the act of 1872, either modify or amend the directors' amendment, or take no action thereon. However, the correlation between section 31 and article 10 is indecisive. This corporation is now subject to the provisions of the General Not for Profit Corporation Act of 1944. (Ill. Rev. Stat. 1955, chap. 32, pars. 163a-163a100.) Section 3 of the act provides: "The provisions of this Act relating to domestic corporations shall apply to: • • • (b) All not for profit corporations heretofore organized

under Sections 29 to 34, inclusive, of an Act entitled 'An Act Concerning Corporations,' approved April 18, 1872, in force July 1, 1872, as amended." (Ill. Rev. Stat. 1955, chap. 32, par. 163a2(b).) Westlake was incorporated under sections 29 to 34 of "An Act Concerning Corporations" approved April 18, 1872.

Section 9 of the act of 1944 provides: "The initial by-laws of a corporation shall be adopted by its board of directors. The power to alter, amend or repeal the by-laws or adopt new by-laws shall be vested in the board of directors unless otherwise provided in the articles of incorporation or the by-laws. The by-laws may contain any provisions for the regulation and management of the affairs of a corporation not inconsistent with law or the articles of incorporation." (Ill. Rev. Stat. 1955, chap. 32, par. 163a8.) Section 15 thereof states that the right of members to vote may be limited, enlarged or denied to the extent specified in the bylaws. (Ill. Rev. Stat. 1955, chap. 32, par. 163a14.) However, article 10 of the bylaws, when construed in the light of these enactments, cannot enlarge the rights of members to make valid bylaws. The board of directors alone had the power to amend the bylaws at all times involved in this litigation, and unless section 14 [sic; sec. 9. ?] is unconstitutional it had the right in 1955 to amend the bylaws to provide for a self-perpetuating directorate.

Plaintiffs urge that the articles of incorporation and the bylaws enacted thereunder constitute a contract between the State and the corporation, the corporation and its members, and the members *inter sese*. (*Kreicker* v. *Naylor Pipe Co.*, 374 Ill. 364), and that this contract may not be impaired. (U. S. Const. 14th Amend. [sic; art. I, sec. 10]; Illinois Const. art. II, sec. 2.) Although we agree with these general principles, we must add that the contract is ever subject to the State's reserved power of amendment, when in the opin-

ion of the legislature the interests of the charitable corporation will be promoted thereby, and to the right of such corporation to amend its bylaws, pursuant to bylaw provisions. (*Kreicker* v. *Naylor Pipe Co.*, 374 Ill. 364; *Steen* v. *Modern Woodmen of America*, 296 Ill. 104; *Murphy* v. *Nowak*, 223 Ill. 301; *Supreme Lodge Knights of Pythias* v. *Kutscher*, 179 Ill. 340; *In re Mt. Sinai Hospital*, 250 N.Y. 103, 164 N.E. 871.) By section 146 of the 1919 act, the legislature expressly reserved the right to amend, repeal or modify the Corporations Act in these words: "The General Assembly shall at all times have power to prescribe such regulations, provisions and limitations as it may deem advisable, which regulations, provisions and limitations shall be binding upon any and all corporations, domestic or foreign, formed or admitted to do business under this Act, and subject thereto, and the legislature shall have power to amend, repeal or modify this Act at pleasure." (Laws of 1919, page 347.) Similar reservation was made in section 100 of the General Not For Profit Corporation Act of 1944, (Ill. Rev. Stat. 1955, chap. 32, par. 163a99, and in article 10 of the bylaws of Westlake pursuant to the provisions of section 33 of the 1944 act. (Ill. Rev. Stat. 1955, chap. 32, par. 163a32.) Therefore the members entered into this contract with the reserved power to amend the statute and bylaws outstanding in the State and in the corporation. This right or power was validly exercised by the board of directors of Westlake.

It is well established in this State that the right of members of a not-for-profit corporation to vote is not constitutionally protected. (*American Aberdeen-Angus Breeders' Association* v. *Fullerton*, 325 Ill. 323, 329 and 330; *People ex rel. Hoyne* v. *Grant*, 283 Ill. 391.) Since the State, through the legislature, retained the right to amend the statutes, and the corporation, pursuant to statute, reserved the power to amend its bylaws, and the right of

members of a charitable corporation to vote is not constitutionally protected, it follows that the amendments in issue did not deprive plaintiffs of their constitutional rights.

The wisdom and desirability of a co-optating or self-perpetuating board of directors for a charitable corporation is a question upon which we express no opinion. That line of argument should be addressed to the legislature and not the court. We only find that the creation of such board by valid amendment of the bylaws does not deprive plaintiffs of their constitutional rights. (*Bailey* v. *American Society for Prevention of Cruelty to Animals,* 282 App. Div. 502, 125 N.Y.S.2d 18; *In re Mt. Sinai Hospital,* 250 N.Y. 103, 164 N.E. 871.) No question of fraud or mismanagement has been raised or suggested in the record before us.

We accordingly conclude that the amendments to the bylaws which were adopted by the directors on August 16, 1955, and November 22, 1955, are valid and subsisting, and that the defendants are a majority of the 15-member board of directors which was legally elected by the board of directors.

The judgment of the trial court is accordingly reversed.

Judgment reversed.

DAILY and BRISTOW, JJ., dissenting.

APPENDIX II

DECREE ENTERED HEREIN IN THE SUPERIOR COURT OF COOK COUNTY ON JANUARY 11, 1957.

This cause coming on for trial and the parties having submitted an Agreed Statement of Facts, and neither party having elected to introduce other evidence, and having submitted briefs to the Court, and the Court having considered the said Agreed Statement of Facts and the said briefs, and having heard the arguments of counsel and being fully advised in the premises,

The Court finds, and it is ordered, adjudged, decreed and declared:

1. This controversy concerns the organization, operation, and control of the "Westlake Hospital Association", a corporation not-for-pecuniary profit, (hereinafter referred to as "Westlake") which said corporation was organized on January 5, 1939, under the Act entitled "An Act Concerning Corporations", approved April 18, 1872, as amended, and then existing as Sections 158 through 163, Chap. 32, Ill. Rev. Stat. 1937.

2. The objects for which Westlake were organized are as follows:

> To operate and maintain a hospital for the treatment of all patients alike regardless of creed, race or ability to pay, but in no case to make any profit; to be maintained by the voluntary contributions of charitably inclined persons; to educate young women in the vocation of nursing without cost to them for tuition; to promote medical research for scientific purpose and not for profit.

3. The said corporation was organized by shareholders of, and succeeded to the assets of a previously existing business corporation, "Proviso Hospital Association". Proviso

Hospital Association then operated, and Westlake Hospital Association now operates a hospital located at 612 North 12th Avenue, Melrose Park, Illinois.

4. Under the plan of reorganization by which Proviso Hospital Association was converted into Westlake Hospital Association, the former shareholders of Proviso Hospital Association received membership certificates in Westlake. Said former shareholders also received certificates of indebtedness, called Class "A" and Class "B" debentures, which said certificates represent obligations of Westlake and are convertible into memberships.

5. The plaintiffs in this case claim to be the majority of the members of the legally constituted Board of Directors of Westlake. The names of the plaintiffs, together with the numbers of memberships and debentures which each held on January 13, 1956, the date of filing the complaint, follows:

Name	Regular Memberships	Class "A"	Class "B"
Dr. Alfred F. Akkeron	110	$ 450	$5,500
Dr. Walter H. Young	115	500	5,750
Dr. Edmund G. Brust, Jr.	150		7,500
Dr. Edmund G. Brust, Sr.	62	4,250	3,450
Edgar M. Elbert	119	1,400	5,950
Guy C. Guerine	43	150	2,500

(Guy C. Guerine holds one Life Membership)

6. The defendants in this case claim to be the majority of the members of the legally constituted Board of Directors of Westlake. The names of the defendants, together with

the numbers of memberships each holds in Westlake are as follows:

Name	Regular Membership
Einar Blix	4
Lawrence Moreno	4
Sam Rubin	4
R. W. Svendsen	0
A. Everett Joslyn, Jr.	3
William P. O'Brien	4
Gerhart M. Collatz	20
Webster D. Corlett	0

(Webster D. Corlett holds one Life Membership)

7. The original by-laws of Westlake provided for three classes of membership; namely, regular membership, life membership, and honorary membership. There are no honorary memberships outstanding, and none ever were issued. There are presently outstanding 42 life memberships, owned largely by business corporations or other business firms, but a few of which are owned by individuals. On December 16, 1955, there were a total of 1260 outstanding regular memberships, standing in the names of some forty-nine persons. A majority of the regular memberships, and a majority of all the memberships outstanding, are in the possession of persons sympathetic to plaintiffs, or in the possession of plaintiffs.

8. The intention of the organizers of Westlake, as expressed in the original by-laws which they adopted on March 11, 1939, was that each membership was to have one vote, and that a member holding more than one membership might vote his memberships cumulatively in meetings of the corporate membership for the election of Directors.

9. The intention of the organizers of Westlake, as expressed in the original by-laws which they adopted on

March 11, 1939, was that the Board of Directors might propose the adoption of amendments to the by-laws, but that adoption of such amendments would require affirmative approval of a majority of the memberships, in whom the ultimate power of amendment was to reside.

10. The provision of Sections 158 through 163, Chap. 32, Ill. Rev. Stat., 1937, under which provisions Westlake was organized, required that the amendment to by-laws of a corporation organized thereunder, which said amendments might be proposed by the board of directors, be made by the membership with such alteration of proposals made by the board of directors as the memberships might desire. The original by-laws of Westlake were drafted to conform to the aforesaid requirements of the aforesaid statute.

11. On December 11, 1952, certain persons acted as the Board of Directors of Westlake. Said group of persons constituted the de facto Board of Directors insofar as the relation of Westlake to third persons is concerned. Said group was not, however, legally constituted nor legally elected in accordance with the governing by-laws of the corporation.

12. The then acting and de facto Board of Directors of Westlake on December 11, 1952, purported to revise and adopt a revision of the by-laws. The said proposed by-laws of December 11, 1952, do not purport to alter the provisions of the original by-laws with regard to voting or with regard to amendment of the by-laws, and under the provisions of the said proposed by-laws of December 11, 1952, ultimate control of the hospital and its affairs is retained by the memberships.

13. The proposed by-laws of December 11, 1952, did not become the de jure by-laws of the corporation until Septem-

ber 6, 1955, and then only with certain amendments adopted by the membership meeting which adopted said by-laws, except that the purported amendment to Article 2, Section 2 of said by-laws providing that no person might be a Director without having 20 memberships, is null and void, constituting an unconstitutional impairment of membership rights, which are inviolate under the Fourteenth Amendment of the Constitution of the United States and Article II, Section 2 of the Constitution of the State of Illinois.

14. During the year 1955, certain persons including both plaintiffs and defendants, acted as the Board of Directors of Westlake. Said group of persons constituted the de facto Board of Directors insofar as the relation of Westlake to third persons is concerned. Said group was not, however, legally constituted or legally elected in accordance with the governing by-laws of the corporation. Purported amendments to the by-laws proposed by this group on August 16, 1955, have no force and effect owing to the illegal constitution of the purported Board.

15. The aforesaid amendments, and also amendments purported to have been adopted by the aforesaid de facto Board on November 22, 1955, are also null and void and of no effect, since the by-laws of the corporation require that amendments be adopted by the memberships, although they may be proposed by the Board.

16. Said attempted amendments by the purported Board on August 16, 1955, and November 22, 1955, are likewise, null, void, and of no effect whatsoever in that said amendments purport to deprive the holders of memberships of the right to vote cumulatively, purport to deprive the memberships of the right to amend the by-laws and to deprive the memberships of ultimate government of the corporation. Said attempted deprivations constitute attempted vio-

lations of inviolate property rights, which may not be countenanced by this Court by virtue of the Fourteenth Amendment to the Constitution of the United States, by Article II, Section 2 of the Constitution of the State of Illinois, and by Article I, Section 10 and Article II, Section 14 of said constitutions, respectively.

17. The duly elected Board of Directors, legally elected in conformity with the by-laws on January 3, 1956, consists of the defendants A. Everett Joslyn, Jr., William P. O'Brien, and Gerhart Collatz, together with the plaintiffs Alfred F. Akkeron, Walter H. Young, Edmund G. Brust, Jr., Edmund G. Brust, Sr., Edgar M. Elbert, and Guy C. Guerine.

18. The duly elected and incumbent officers of the corporation are as follows: Alfred F. Akkeron, president; Edmund C. Brust, Jr., vice-president; Walter H. Young, treasurer; and Guy C. Guerine, secretary.

19. The rights of the membership holders in Westlake and the rights of the debenture holders, as set forth in the instruments evidencing the same and the properly adopted by-laws of Westlake as herein found, are hereby declared to be inviolate, in accordance with the aforecited provisions of the Constitution of the United States and of the Constitution of the State of Illinois.

20. The rights of the membership are hereby declared to include the right to ultimate government over the affairs of the corporation, the power to amend the by-laws, and the power to elect Directors.

21. The attempt by the defendants to deprive the memberships of the right to elect directors of Westlake and to establish a cooptating board of Directors in their aforesaid purported amendments is null, void, and of no effect and

constitutes an attempt to deprive the membership holders of property rights in violation of the aforecited provisions of the Constitution of the United States and the Constitution of the State of Illinois.

22. A permanent People's Writ of Injunction shall issue enjoining the defendants Einar Blix, Webster D. Corlett, Lawrence Moreno, Sam Rubin, R. W. Svendsen, their agents, servants, solicitors, and attorneys from pretending henceforth to be Directors of Westlake and from interfering as such pretended Directors with the affairs and operations of Westlake Hospital Association; enjoining the defendant Gerhart M. Collatz from acting or pretending to act as president of Westlake, and enjoining the defendant Lawrence Moreno from acting or pretending to act as secretary of Westlake Hospital Association, and from withholding from Guy C. Guerine, duly elected secretary of Westlake Hospital Association, the corporate books and records of said corporation; and requiring said Lawrence Moreno to deliver said books and records to said Guy C. Guerine forthwith; and enjoining Einar Blix, Webster D. Corlett, Lawrence Moreno, Sam Rubin, R. W. Svendsen, A. Everett Joslyn, Jr., William P. O'Brien and Gerhart Collatz, their agents, servants, solicitors and attorneys from calling or pretending to call as officers, and Einar Blix, Webster D. Corlett, Lawrence Moreno, Sam Rubin and R. W. Svendsen as officers or directors, membership meetings of the corporation, or from interfering with the organization and operation of Westlake Hospital Association or its duly elected and acting Board of Directors, as found herein to be the duly elected and acting Board of Directors, or with the duly elected and acting officers, as found herein.

23. The Complaint herein was duly filed on behalf of the Westlake Hospital Association by the plaintiffs Alfred F.

Akkeron, Walter H. Young, Edmund G. Brust, Jr., Edmund C. Brust, Sr., Edgar M. Elbert, and Guy C. Guerine; and the law firm of Brown, Dashow & Ziedman was duly authorized by said individual plaintiffs to bring this action on behalf of and in the name of Westlake Hospital Association and the names of the individual plaintiffs who constitute a majority of the duly elected and acting Board of Directors of the Westlake Hospital Association.

24. The equities are with the plaintiffs herein and the counter claim of defendants is dismissed for want of equity.

25. The plaintiffs have and recover of and from the defendants the plaintiffs' costs and have judgment therefor.

Enter

/s/ John J. Lupe
Judge

January 11th, 1957.

APPENDIX III—STATUTES

Corporations Not for Pecuniary Profit

An Act concerning corporations. [Approved April 18, 1872. L. 1871-2, p. 296.] [Ill. Rev. Stat., 1937, Chap. 32.]

[§§ 1-28½. Repealed. L. 1919, p. 312.]

158. How organized.] § 29. Societies, corporations and associations, not for pecuniary profit, for civic, educational, patriotic, agricultural, horticultural, soil, crop, live-stock and poultry improvement, electrification on a co-operative basis, ownership of residential property on a co-operative basis, pleasure, social, athletic, political, benevolent, charitable, eleemosynary, research, or other similar purposes and commercial, industrial or trade associations may be organized, without pecuniary profit to the members thereof, as hereinafter provided. Any three or more persons, citizens of the United States, who shall desire to associate themselves for any such lawful purpose, other than for the purpose of benefiting any person or persons, or widows, orphans, heirs and devisees of deceased members thereof, or otherwise, and members who have received a permanent disability, and where the members shall receive no money as profit or otherwise, except for permanent disability, may make, sign and acknowledge, before any officer authorized to take acknowledgments of deeds in this State and file in the office of the Secretary of State a certificate in writing, in which shall be stated the name or title, which name or title shall be in the English language, by which such corporation, society or association shall be known by law, the location of the business office of the corporation by street and number, the particular business and object for which it is formed, the number of its trustees, directors and managers, which shall not be less than three, and the names and addresses of the trustees, directors or managers se-

lected for the first year of its existence subject to such limitation, the number of directors shall be fixed by the by-laws, provided that a benefit association, the membership of which is confined to the membership of any fraternal organization operating on a secret or ritual basis, or any lodge thereof, may be organized under this Act.

159. Certificate of organization.] § 30. Upon filing a certificate as aforesaid, the secretary of state shall thereupon issue a certificate of the organization of the corporation, society or association, making a part thereof a copy of all papers filed in his office in and about the organization thereof, and duly authenticated under his hand and seal of state; and the same shall be recorded in a book for that purpose, in the office of the recorder of deeds of the county in which the principal place of business of such corporation, society or association is located. Upon complying with the foregoing conditions, the corporation, society or association shall be deemed fully organized, and may proceed to business: Provided, the secretary of state shall not issue a certificate of organization to any corporation, society or association under the name of any then existing.

160. Powers—Certain associations abolished.] § 31. Corporations, associations and societies, formed under this Act, shall be bodies, corporate and politic, by the name stated in such certificate; and by that name they and their successors shall and may have succession, and shall be persons in law capable of suing and being sued; may have power to make and enforce contracts in relation to the legitimate business of their corporation, society or association; may have and use a common seal, and may change or alter the same at pleasure; and they and their successors, by their corporate name, shall in law be capable of taking, purchasing, holding and disposing of real and personal estate for the purposes of their organization; may, by their

trustees, directors or managers, make by-laws not inconsistent with the constitution and laws of this State, or the United States, which by-laws, among other things, shall prescribe the duties of all officers of the corporation, society or association, and the qualification of members of the corporation, and shall provide for regular meetings of such members at least once in five years and for the calling of special meetings, when necessary, and for the number of members that shall constitute a quorum for the transaction of business at any such regular or special meeting. At any such meeting members of the corporation may take part and vote in person or by proxy. The by-laws of the corporation made by the trustees, directors or managers, may be modified, altered or amended at any such regular meeting, or at any adjourned session thereof, or at any special meeting called for that purpose. Associations and societies which are intended to benefit any person or persons or widows, orphans, heirs and devisees of deceased members thereof, and members who have received a permanent disability, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, except for permanent disability, heretofore incorporated under the provisions of this Act, shall not, after this Act becomes effective, engage in such business other than that they may retain their corporate existence for six months for the sole purpose of winding up their business or reincorporating under some Act, the enforcement of which comes within the jurisdiction of the Department of Insurance of this State.

161. Trustees—Officers—Borrowing money—Report and fee for filing thereof.] § 32. Corporations, associations and societies, formed under the provisions of this Act, may elect trustees, directors or managers from the members thereof,

in such manner, at such time and places, and for such periods as may be provided by the certificate of incorporation, or in case such certificate does not contain such provision, then as may be provided by the by-laws, which trustees, directors or managers shall have the control and management of the affairs and funds of the corporation, society or association. Said trustees, managers or directors may, upon consent of the corporation, society or association, express by the vote of a majority of the members thereof, present at any regular meeting or special meeting called for that purpose, provided always, that a quorum be present, borrow money to be used solely for the purpose of their organization and may pledge their property therefor. Trustees, managers or directors of corporations organized for the purpose of promoting agriculture, upon consent of any regular meeting, or special meeting called for that purpose, of the members or other body entitled to elect the trustees, directors or managers of such corporation, society or association (provided always that a quorum, as ascertained by the by-laws thereof, be present at such meeting), may acquire by purchase or otherwise, stocks and evidences of indebtedness of corporations whose activities will directly or indirectly promote agriculture or the interest of those engaged therein. Whenever trustees, managers or directors shall be elected, a certificate under the seal of the corporation, giving the names of those elected and the term of their office, shall be recorded in the office of the recorder of deeds, where the certificate of organization is recorded. Vacancies in the board of trustees, directors or managers shall be filled in the manner provided by their by-laws, and upon filling any vacancy a like certificate shall be recorded.

Such corporations shall make a report in writing to the Secretary of State between the first day of February and

the first day of March each year, on forms to be prescribed and furnished by the Secretary of State, on or before the 15th day of January of each year, giving the address of the corporation and the names and addresses of the officers and directors, but the failure to send or to receive such forms shall not relieve any such corporation from the duty of making such report.

Such report shall be verified by oath of some officer of such corporation, society or association.

The Secretary of State shall charge and collect from each corporation, society or association, a fee of ($1.00) one Dollar for the filing of such report and in case any corporation, society or association shall fail, neglect or refuse to file such annual report as required by this Act it shall be certified by the Secretary of State to the Attorney-General for dissolution in the same manner as is required under the provisions of the Business Corporation Act of this State, and the Attorney-General shall proceed in like manner to dissolve such corporation, society or association.

162. Distribution of property—Dissolution.] § 33. No dividends or distribution of the property of such corporation, society or association shall be made until all debts are fully paid and then only upon its final dissolution and surrender of organization and name; nor shall any distribution be made except by a vote of a majority of the members. Whenever a majority of the members of such corporation, society or association shall wish to dissolve the corporation and abandon the corporate enterprise, the trustees, directors or managers shall call a meeting of the members in accordance with the by-laws, to vote upon the proposition of dissolving the corporation. Upon the passing of a resolution of dissolution in accordance with the by-laws

of the corporation, the secretary of the corporation shall certify to the fact of the passing of the resolution of dissolution and the further fact that all the debts of the corporation have been paid and the property distributed among the members according to their respective rights, which certificate shall be under the seal of the corporation and verified by oath of the president and recorded in the office of the county recorder of the county wherein the business office of the corporation is located and filed in the office of the Secretary of State. Upon the filing of the certificate of dissolution duly recorded, the Secretary of State shall examine the same and if it is in conformity with the law, shall issue a certificate of dissolution. Upon the issuance of said certificate of dissolution by the Secretary of State, such corporation, society or association shall cease to exist. In case any statement made by the president and secretary of the corporation relating to the dissolution of said corporation, shall be wilfully false, said officers shall be jointly and severally liable for the debts of such corporation, society or association.

163. Amendment of articles.] § 34. Any such corporation, society or association may change its articles of association, in the manner prescribed by their own rules, but no such change shall be of legal effect until a certificate thereof, verified by oath of the president, under seal of such corporation, society or association, shall be filed in the office of the Secretary of State, and recorded in the office of the recorder of deeds in which the original certificate was recorded. [As amended by act approved June 28, 1919. L. 1919, p. 365.]

ILLINOIS REVISED STATUTES (1919), CHAP. 32, § 28a118

"An Act in relation to corporations for pecuniary profit," approved June 28, 1919, in force July 1, 1919 (Laws of 1919, page 347) . . .

§ 146. The General Assembly shall at all times have power to prescribe such regulations, provisions, and limitations as it may deem advisable, which regulations, provisions, and limitations shall be binding upon any and all corporations, domestic or foreign, formed or admitted to do business under this Act, and subject thereto, and the legislature shall have power to amend, repeal or modify this Act at pleasure.

ILLINOIS REVISED STATUTES, (1935), CHAP. 32

§ 167. Repeal. The Act entitled "An Act in relation to corporations for pecuniary profit," approved June 28, 1919, in force July 1, 1919 as amended, is hereby repealed.

GENERAL NOT FOR PROFIT CORPORATION ACT

Approved July 17, 1943
Effective January 1, 1944
(Including Amendments Enacted to 1951)

AN ACT *to revise the law relating to Corporations not for pecuniary profit.*

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

[Parenthetical references to paragraph numbers in Ill. Rev. Stat., 1951, Chap. 32.]

(§ 163a)

§ 1. Title. This Act shall be known and may be cited as the "General Not for Profit Corporation Act."

(§ 163a2)

§ 3. Applicability. The provisions of this Act relating to domestic corporations shall apply to:

(a) All corporations organized hereunder; and

(b) All not for profit corporations heretofore organized under Sections 29 to 34, inclusive, of an Act entitled "An Act Concerning Corporations" approved April 18, 1872 in force July 1, 1872, as amended;

(c) Each not for profit corporation, without shares or capital stock, heretofore organized under any general law or created by Special Act of the Legislature of this State for a purpose or purposes for which a corporation may be organized under this Act, but not otherwise entitled to the rights, privileges, immunities and franchises provided by this Act, which shall elect to accept this Act as hereinafter provided; and * * *

(§ 163a3)

§ 4. Purposes. Not for profit corporations may be organized under this Act for any one or more of the following or similar purposes: charitable; benevolent; eleemosynary; educational; civic; patriotic; political; religious; social; literary; athletic; scientific; research; agricultural; horticultural; soil, crop, livestock and poultry improvement; professional, commercial, industrial or trade association; electrification on a co-operative basis; and ownership of residential property on a co-operative basis.

(§ 163a7)

§ 8. Members. A corporation may have one or more classes of members. The designation of such class or classes and the qualifications and rights of the members of each class shall be set forth in the articles of incorporation or the by-laws. A corporation may issue certificates evidencing membership therein.

(§ 163a8)

§ 9. By-Laws. The initial by-laws of a corporation shall be adopted by its board of directors. The power to alter, amend or repeal the by-laws or adopt new by-laws shall be vested in the board of directors unless otherwise provided

in the articles of incorporation or the by-laws. The by-laws may contain any provisions for the regulation and management of the affairs of a corporation not inconsistent with law or the articles of incorporation.

(§ 163a12)

§ 13. Meetings of Members. Meetings of members may be held at such place, either within or without this State, as may be provided in the by-laws. In the absence of any such provision, all meetings shall be held at the registered office of the corporation in this State.

An annual meeting of the members shall be held at such time as may be provided in the by-laws. Failure to hold the annual meeting at the designated time shall not work a forfeiture or dissolution of the corporation.

Special meetings of the members may be called by the president or by the board of directors. Special meetings of the members may also be called by such other officers or persons or number or proportion of members as may be provided in the articles of incorporation or the by-laws. In the absence of a provision fixing the number or proportion of members entitled to call a meeting, a special meeting of members may be called by members having one-twentieth of the votes entitled to be cast at such meeting.

(§ 163a13)

§ 14. Notice of Members' Meetings. Written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than five nor more than forty days before the date of the meeting, either personally or by mail, by or at the direction of the president, or the secretary, or the officers or persons calling the meeting, to each member entitled to vote at such

meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the member at his address as it appears on the records of the corporation, with postage thereon prepaid.

(§ 163a14)

§ 15. Voting. The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or the by-laws. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

A member may vote either in person or by proxy executed in writing by the member or by his duly authorized attorney-in-fact. No proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy. Where directors or officers are to be elected by members, the by-laws may provide that such elections may be conducted by mail.

The articles of incorporation or the by-laws may provide that in all elections for directors every member entitled to vote shall have the right to cumulate his vote and to give one candidate a number of votes equal to his vote multiplied by the number of directors to be elected, or to distribute such votes on the same principle among as many candidates as he shall think fit.

(§ 163a15)

§ 16. Quorum. The by-laws may provide the number or percentage of members entitled to vote represented in person or by proxy or the number or percentage of votes represented in person or by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provision, members holding one-tenth of the votes entitled to be cast represented in person or by proxy, shall consti-

tute a quorum. The vote of a majority of the votes entitled to be cast by the members present or represented by proxy at a meeting at which a quorum is present, shall be necessary for the adoption of any matter voted upon by the members, unless a greater proportion is required by this Act, the articles of incorporation or the by-laws.

(§ 163a16)

§ 17. Board of Directors. The affairs of a corporation shall be managed by a board of directors. Directors need not be residents of this State or members of the corporation unless the articles of incorporation or by-laws so require. The articles of incorporation or the by-laws may prescribe other qualifications for directors.

(§ 163a17)

§ 18. Number and Election of Directors. The number of directors of a corporation shall be not less than three. Subject to such limitation, the number of directors shall be fixed by the by-laws, except as to the number of the first board of directors which number shall be fixed by the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to the by-laws, unless the articles of incorporation provide that a change in the number of directors shall be made only by amendment of the articles of incorporation. In the absence of a by-law fixing the number of directors, the number shall be the same as that stated in the articles of incorporation.

The directors constituting the first board of directors shall be named in the articles of incorporation and shall hold office until the first annual election of directors or for such other period as may be specified in the articles of incorporation or the by-laws. Thereafter, directors shall be

elected or appointed in the manner and for the terms provided in the articles of incorporation or the by-laws. In the absence of a provision fixing the term of office, the term of office of a director shall be one year.

Directors may be divided into classes and the terms of office of the several classes need not be uniform. Each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified.

(§ 163a99)

§ 100. Certain Powers Reserved to General Assembly. The General Assembly shall at all times have power to prescribe such regulations, provisions, and limitations as it may deem advisable, which regulations, provisions, and limitations shall be binding upon any and all corporations, domestic or foreign, subject to the provisions of this Act, and the General Assembly shall have power to amend, repeal, or modify this Act at pleasure.

(§ 163a100)

§ 101. Effect of Repeal of Prior Law. The repeal by this Act of any act or parts of any act shall not affect any right accrued or established, or any liability or penalty incurred, prior to the repeal thereof.

(§ 163a102 ref.)

§ 103. Repeal. Sections 29 to 34, inclusive, of an Act entitled "An Act Concerning Corporations" approved April 18, 1872 in force July 1, 1872, as amended, are hereby repealed.

(§ 163a103 ref.)

§ 104. Effective. This Act shall become effective January 1, 1944.

(Approved July 17, 1943.)

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IN THE

Supreme Court of the United States

OCTOBER, 1958 TERM

No. 184

WESTLAKE HOSPITAL ASSOCIATION, an Illinois Corporation Not for Profit, ALFRED F. AKKERON, WALTER H. YOUNG, EDMUND G. BRUST, JR., EDMUND G. BRUST, SR., EDGAR M. ELBERT and GUY C. GUERINE,

Appellants,

vs.

EINAR BLIX, WEBSTER D. CORLETT, LAWRENCE MORENO, SAM RUBIN, R. W. SVENDSEN, A. EVERETT JOSLYN, JR., WILLIAM P. O'BRIEN and GERHART M. COLLATZ,

Appellees.

On Appeal from the Supreme Court of the State of Illinois.

MOTION TO DISMISS OR AFFIRM.

JOSEPH D. BLOCK
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IN THE

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Appellees.

On Appeal from the Supreme Court
of the State of Illinois.

MOTION TO DISMISS OR AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss this appeal or to affirm the decision below on the grounds that (1) the constitutional question is not adequately presented; (2) the question presented is so unsubstantial as not to require further argument; and (3) the decision of the Supreme Court of Illinois is correct.

STATEMENT.

The Supreme Court of Illinois held that the board of directors which had been duly elected by the members of Westlake Hospital Association, a Not for Profit Charitable Corporation, (1) had, from the date the Association was organized, the right to amend the by-laws of the Association, (2) had that right exclusively from and after the passage of Section 9 of the Illinois General Not for Profit Corporation Act of 1944 (Chap. 32 Par. 163a-163a100 Ill. Rev. Stat. (1955)) and (3) validly exercised its right of amendment to provide for the election of directors by the directors instead of the members.

ARGUMENT.

The Constitutional Question Is Not Properly Presented.

The Supreme Court of Illinois construed only a few sections of the General Not for Profit Corporation Act of Illinois. Appellants, however, claim that the entire Act consisting of some 100 sections is unconstitutional as applied to them. (Jurisdictional Statement, Page 2) Jurisdiction of this appeal depends upon the determination of the validity of a state statute which has been questioned on constitutional grounds. At no time did appellants ever question or put into issue the validity of the entire Act as they seek to do in this appeal. Their failure to point out to this Court those particular sections of the Act which are invalid or in the alternative to show why the entire Act is unconstitutional should result in a dismissal of this appeal.

The Questions Presented Are Not Substantial.

The Jurisdictional Statement does not cite any legislative enactment which divested appellants or any other members of Westlake Hospital Association of any of their constitutional rights, nor does the Statement point out the manner in which the state legislature impaired the members' contract. Instead there is a general discussion of the importance of control of charitable corporations.

The discussion is meaningless because nowhere do appellants define "control". Control in the sense of the day to day management of the corporation's business is always exercised by the board of directors and not by the members. Fletcher, Private Corporations, Chap. 15, § 2104. The members of Westlake Hospital have no more right to exercise this form of control than do contributors to and members of such charitable organizations as

the American Red Cross, the National Polio Foundation and countless other similar organizations. There is no decision holding that such control is guaranteed by the Constitution.

If, on the other hand, appellants use the word control to mean that a contributor to a charitable corporation may control his donation so it is applied to the purposes for which it was intended, this appeal must fail because there is here no issue of the diversion of Westlake funds or resources from the charitable hospital purposes set forth in its charter. Neither the legislature of Illinois, its courts nor the board of directors of Westlake Hospital have exercised their power to destroy or disregard the donative intent of the hospital's contributors.

While it is true that charitable corporations occupy an important place in our society, it is equally true that they are creatures of the state and as such should be regulated and controlled by the state. The Supreme Court of Illinois in the present case recognized that the wisdom or extent of that regulation was a matter to be addressed to the state legislature rather than to the courts.

The Decision Below Was Correct.

The essence of appellants' complaint is that they were deprived of their right to elect directors. It has never been held that the right to vote for directors is a constitutionally protected right. The only case cited and relied upon by appellants to sustain their contention was reversed by the Supreme Court of New Jersey in *Rankin* v. *Newark Library Association,* 64 N.J.L. 265, 45 Atl. 622 (1900) where the Court in referring to the right of a stockholder in a library association to vote stated:

> "The right thus claimed is of little value. The charter and history of the association show that it was cr-

> ganized, not for pecuniary gain but for educational purposes, and that so long as the association was a going concern the shares of stock represented scarcely more than the holders' contribution to this benevolent object." 64 N.J.L. 267.

Although the New Jersey Court subsequently found it unnecessary to decide the exact nature of the stockholders' right to vote, that precise question was squarely presented and passed upon in *In re Mt. Sinai Hospital,* 250 N.Y. 103, 164 N.E. 871 (1928). There the New York Court of Appeals upheld the Act of the New York State Legislature amending the charter of the hospital taking from the members the right to elect directors and giving the board of directors the power to perpetuate itself. Judge Pound analyzed the nature of the right involved and held that it was not constitutionally protected. The court stated:

> "If their privilege to vote for trustees presents any evidence of ownership or vested right to share in the control of the corporation such as we associate with the idea of property, it may be beyond the power of the Legislature to take it from them. They had the bare right to vote for trustees because they were mere members of the corporation paying an annual membership fee. When they became members of the corporation they consented in advance to everything that could be done by legislative amendment to the charter which did not deprive them of their constitutional rights. They took the risk of a true amendment.
>
> "A member's right to voice in the management of a corporation may under conditions not presented here be a vested interest entitled to protection under the Constitution. *What vested interest does a mere voting member of a charitable corporation, devoted in part, at least, to public uses, have to protect of*

which he is deprived when he is deprived of his right to vote? Not, as in the case of the stockholders of a business corporation, property interests of his own, because he has no interest in the property of the corporation. If the corporation were dissolved, the funds would not be awarded to the individual members. The members do not invest their money. They give it to charity. Not the right of a founder, or one who contributes money under express conditions, to have the statutes of his foundation as to the powers of trustees or the terms of his conditions, strictly adhered to, except so far as he consents to their alteration. Appellants are not founders, nor did they attach any express conditions to the payment of their membership dues. Appellants are not asserting the right of the corporation to prevent the transfer of the corporate property from one board of trustees to another by the creation of a new corporation under a new charter, for no such transfer is attempted. The corporation continues to elect its own trustees. Nor are they asserting the right of the corporation to prevent diversion of the funds raised for the corporation; the corporation and its purposes remain intact. The voting power was exercised by the members for the benefit of the corporation. Appellants have no beneficial interest of their own to protect; no 'definite right secured to him [them] by a contract with the corporation' * * *." 164 N.E. 874-5. (Citations omitted; Emphasis supplied)

Regardless of how the right to vote for directors is characterized, the members, at the time the association was organized, gave to the board of directors of Westlake Hospital the power to amend the by-laws and thus to eliminate the members' voting rights. The members lost their voting rights not by any legislative enactment but by operation of Article 10 of the by-laws. The membership certificate provided on its face that the rights of members were subject to by-law amendments. (Record 3, Abst. 22).

Long before Westlake Hospital Association was organized it was settled law in Illinois that members of Not for Profit Corporations did not have the constitutional right to vote for directors nor indeed to vote on any particular matters whatsoever. *American Aberdeen-Angus Breeders' Association* v. *Fullerton,* 325 Ill. 323, 156 N. E. 314 (1927); *People Ex rel. Hoyne* v. *Grant,* 208 Ill. App. 235 (1917) aff'd 283 Ill. 391, 119 N.E. 344 (1918).

These decisions held that the corporation act under which Westlake was organized permitted the elimination of members' voting rights and permitted the directors to amend the by-laws. The passage of the General Not for Profit Corporation Act of 1944, the Act which appellants are challenging, effected no substantive change in this respect. But in any event, as the Supreme Court of Illinois pointed out, the legislature always retained the reserve power of amendment.

Respectfully submitted,

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Appellees.

On Appeal From the Supreme Court of the State of Illinois

REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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Appellees.

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REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

The Appellees, in their motion to dismiss or affirm, have misstated both the holding of the Illinois Supreme Court below and the position of the appellants. As a consequence of their misstatement, their motion is not responsive.

REPLY TO THE "STATEMENT"

On page 2 of their motion, appellees purport to set forth the holding of the Supreme Court of Illinois. In the first place, the board in question had not been "duly elected by the members", and the Illinois Supreme Court did not hold that it was. (The facts with respect to how the board in

question was created are set forth in the opinion below, pp. 19-20 of the Jurisdictional Statement.) Secondly, the statement that the board had, from the date of organization, the right to amend the by-laws under the interpretation of the Illinois Supreme Court, is a dangerous half-truth, since the Illinois court specifically held that, while the board could adopt amendments, the board was required to give notice to the membership and the members "could then, pursuant to the provisions of section 31 of the act of 1872, either modify or amend the directors' amendment, or take no action thereon." (Opinion, p. 27 of Jurisdictional Statement.) With these facts in mind, the importance of the appellees' statement of the Illinois Supreme Court holding that the Directors had this power "exclusively from and after the passage of Section 9" of the 1944 Act (i.e., the power to modify, alter, etc., could be taken away) becomes apparent since this holding immediately raises the constitutional problem.

Reply to the Allegation that the Questions are Not Substantial

The appellees state that appellants are putting the validity of the entire General Not for Profit Corporation Act of Illinois into question for the first time on appeal, and that therefore the question of constitutionality is not properly presented. The appellants are not questioning the validity of the entire act, and it is difficult to ascertain how the appellees, after having read the Jurisdictional Statement, can come to such a conclusion. Perhaps the fact that appellants cited the entire statute at one point and reprinted most of it in the appendix to the Jurisdictional Statement misled the appellees. To make it perfectly clear, appellants are challenging those sections of the Act interpreted by the Illinois Supreme Court to give the power to the

Board of Directors to take voting and other rights away from the membership, and only those sections.

Reply to the Allegation that the Questions Presented are Not Substantial

The appellees charge that the Jurisdictional Statement does not point out any legislative enactment which impaired the appellants' contracts. This charge comes immediately after the charge that appellants challenged a complete statutory enactment for the first time on appeal. First the appellees see too much, and then they cannot see anything. The charge made here is unworthy of further response.

The appellees then go on to say that appellants' statement is defective because "control" is not defined, whereupon appellees provide their own definition of control as the day-to-day management of a corporation by the directors, and conclude that the members could not be entitled to any such kind of "control". Appellants are not disputing over a question as to who has a right to manage the daily affairs of a corporation, but rather about who has a right to elect directors, make changes in the by-laws, and lay down the fundamental policy of the corporation. Appellees do not direct themselves to the issue set forth by appellants in their Jurisdictional Statement.

The appellees assert that the donors to the American Red Cross and the National Polio Foundation, among other organizations, have no right to "control" of the organization. In the sense of managing the distribution of the funds, this statement is true. But the donors might well be able to object if the funds contributed to the Red Cross could be diverted to other hands or other purposes. In any case, the gifts which made Westlake possible were given upon the specific conditions and contracts created by the certificate of incorporation and original by-laws, as the evidence makes clear.

The appellees further state the appeal should fail because charitable corporations are creatures of the state and should be regulated and controlled by the state. Appellants surely agree, but must add that the power to regulate and control must constitutionally be limited to reasonable exercises of legitimate police powers, and not the wholesale, arbitrary deprivation of rights such as was suffered by the appellants in this cause.

THE ALLEGATION THAT THE DECISION BELOW WAS CORRECT

In this section, the appellees appear to be arguing that the legislature constitutionally has such plenary control over not-for-profit corporations that the legislature may even act unreasonably, arbitrarily and capriciously to deprive members of their rights. The New York courts do not go so far as the appellees would like to pretend, *Re Flushing Hospital,* 27 N.Y.S. 2d 207, aff'd 262 A. D. 749 (1941), and the appellees' argument is contrary to reason and justice. No case cited by appellees supports their cavalier statements, and appellants submit that they have demonstrated the verity of their position in their Jurisdictional Statement.

Respectfully submitted,

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